
General Counsel's Supplemental Report

January 1, 2000 - April 24, 2000

Public Employment Relations Commission

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APPEALS FROM COMMISSION DECISIONS
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Representation

In *Ocean Cty. Sheriff and Ocean Cty. Sheriff's Officers, FOP Lodge No. 135*, P.E.R.C. No. 99-70, 25 *NJPER* 117 (¶30051 1999), aff'd 26 *NJPER* 170 (¶31067 App. Div. 2000), the Appellate Division affirmed the Commission's dismissal of two representation petitions seeking to sever sheriff's officers and superior sheriff's officers from negotiations units including corrections officers and superior corrections officers. The units had been represented by the majority representatives for decades and had functioned well. While the County was the sole employer of corrections officers and the County and the Sheriff were joint employers of sheriff's officers, the Commission held that these multi-employer units should not be disrupted. The Court

agreed and reiterated the deference paid the Commission in representation cases.

Unfair Practice Cases

Certification has been granted in the *Middletown Tp.* case discussed in my annual report. 163 *N.J.* 11 (2000).

School boards are prohibited from paying increments to teaching staff members during negotiations after a three-year contract expires. *Neptune Bd. of Ed. v. Neptune Ed. Ass'n*, 144 *N.J.* 16 (1996). In *East Hanover Bd. of Ed. and East Hanover Ed. Ass'n*, P.E.R.C. No. 99-71, 25 *NJPER* 119 (¶30052 1999), aff'd App. Div. Dkt. No. A-004226-98T1 (4/10/00), the question was whether, after a three-year contract expired, a school board was required to pay increments to nonprofessional employees in the same negotiations unit as teachers. The Commission answered this question no, saying that it was unwise, "as a matter of labor relations policy, to have separate rules for increment payments

for different types of employees within a single, broad-based negotiations unit." The Court agreed.

In *Borough of Bogota and PBA Local 86*, P.E.R.C. No. 99-77, 25 *NJPER* 129 (¶30058 1999), aff'd 26 *NJPER* 169 (¶31066 App. Div. 2000), pet. for certif. pending, the Appellate Division held that, under the circumstances, the Borough had a prerogative to replace police officer dispatchers with civilians and to reassign the police officers to operational, investigative, supervisory, and crime prevention duties. Describing the Commission's decision as thorough and well-reasoned decision, the Court held that *City of Jersey City v. Jersey City POBA*, 154 *N.J.* 555 (1998), compelled the finding of a prerogative. The PBA has petitioned for certification.

Scope of Negotiations Cases

An Appellate Division panel has reversed and remanded *Randolph Tp. Bd. of Ed. and Randolph Ed. Ass'n*, P.E.R.C. No. 99-45, 25 *NJPER* 14 (¶30005 1998), rev'd and rem'd 328 *N.J. Super.* 540 (App. Div. 2000), pet. for certif. pending. The Commission had held that the 1990 amendments, *N.J.S.A.* 34:13A-22 through 29,

make all increment withholdings involving non-professional employees subject to binding arbitration under *N.J.S.A.* 34:13A-29, but the Court held instead that such withholdings are not subject to arbitration if they are based on an evaluation of performance. The Court also held that the Commission has jurisdiction to decide whether the basis for a withholding is evaluative or disciplinary even though *N.J.S.A.* 34:13A-27 only confers jurisdiction to decide whether withholdings involving teaching staff members are based on "teaching performance." The Association and the Commission have both petitioned for certification.

The Appellate Division has affirmed *Demarest Bd. of Ed. and Demarest Ed. Ass'n*, P.E.R.C. No. 99-36, 24 *NJPER* 514 (¶29239 1998), aff'd 26 *NJPER* 113 (¶31046 App. Div. 2000). The Commission declined to restrain binding arbitration of a grievance contesting a music teacher's increment withholding; it found that two of the three-cited reasons were not based on teaching performance.

Leaves To Appeal

Leave to appeal a temporary restraining order was denied in *North Hudson Firefighters Ass'n and North Hudson Reg. Fire & Rescue*, I.R. No. 2000-7, 26 *NJPER* 108 (¶31044

2000). Commission designee Reichman restrained the employer from altering biweekly pay dates during negotiations.

Leave to appeal an interim relief order was denied in *Camden City Bd. of Ed. and Camden City Fed. of School Administrators*, I.R. No. 2000-5, 26 *NJPER* 80 (¶31031 1999). Commission designee Reichman ordered the Board to pay increments during negotiations after a two-year contract expired. *Neptune's* prohibition does not apply to two-year contracts.

Motions for Stay

The Appellate Division denied the employer's motion for a stay pending appeal in *Teaneck Tp. and FMBA Local No. 42*, *P.E.R.C.* No. 2000-33, 25 *NJPER* 450 (¶30199 1999), app. pending App. Div. Dkt. No. A-001850-99T1. The Commission affirmed an interest arbitration award, with one modification on a work schedule issue. This is the first case appealed to the courts since the Commission was given jurisdiction in 1996 to review interest arbitration awards.

Enforcement

The Township of Nutley has complied with the order discussed in my annual report.

Miscellaneous

Two other appeals from Commission decisions were dismissed.

Other Court Cases

Grievance Arbitration

1. Decisions Confirming Awards

In *Hudson Cty. v. PBA Local 109A*, App. Div. Dkt. No. A-1352-98T3 (1/18/00), the Court confirmed a grievance arbitration award requiring the employer to pay employees serving as union representatives when attending Executive Board meetings and other union meetings. The arbitrator interpreted the past practices clause to require payment.

In *Bergen Pines Cty. Hosp./Bergen Cty. v. JNESO, Dist. Council 1, IUOE, AFL-CIO*, App. Div. Dkt. No. A-4465-098T5 (2/16/00), the Court confirmed an award paying employees for accrued sick leave and vacation pay. Effective March 15, 1998, the County transferred operation of Bergen Pines County

Hospital to a private sector company; it then declined to credit employees for accrued vacation and sick leave time for the first two weeks of March because they did not work the entire month. The arbitrator, the trial court, and the Appellate Division all rejected that position.

2. Other Arbitration-Related Decisions

In *Trentacost v. City of Passaic*, 327 N.J. Super. 320 (App. Div. 2000), the Court rejected a claim that the Commission had sole jurisdiction over lawsuits asserting that the City's collective negotiations agreement required it to pay three retired firefighters for unused holidays and augmented pension benefits based on that pay, retroactive to January 1, 1994. The Court ruled that holiday pay is a mandatorily negotiable employment condition so there was no negotiability issue within the Commission's jurisdiction. The Court next ruled that the retirees' claims should have been presented through the grievance procedure. It rejected the City's contention that the contractual deadlines necessarily precluded resort to the grievance procedure, concluding that the procedural arbitrability issues concerning

timeliness should be resolved by an arbitrator. It remanded the case for the trial court to resolve the contractual issues if neither party demanded arbitration within 30 days.

In *Troy v. Rutgers*, App. Div. Dkt. No. A-3817-98T3 (2/14/00), various Rutgers professors filed a lawsuit asserting that their individual contractual rights were violated when they were given academic-year appointments instead of calendar-year appointments and their salaries were reduced pro rata. Judges Petrella, Conley and Coburn granted Rutgers summary judgment on their contract claims and held that any rights the professors might have were exclusively subject to advisory arbitration under the Rutgers-AAUP collective negotiations agreement.

The Connecticut Supreme Court has held that grievance arbitrations conducted by the State Board of Mediation are not "public meetings" under Connecticut's Freedom of Information Act. *State Bd. of Labor Relations v. Freedom of Information Commission*, 163 LRRM 2171 (1998). The Court upheld a refusal to permit a party to tape-record arbitration proceedings.

Collective Negotiations Agreements

The State Board of Education has held that a school board member is not prohibited from voting on a collective negotiations agreement solely because the member or the member's spouse belongs to (or is represented by) a different local affiliate of the same statewide association with whom the agreement is made. *In re Frank Pannucci*, SB#16-97 (3/11/00). The State Board's ruling was urged by both the New Jersey School Boards Association and the New Jersey Education Association. It overturns the ruling of the School Ethics Commission that a school board member in Brick Township could not vote on a collective negotiations agreement between his school board and an NJEA affiliate because he taught in East Orange where he was represented by another NJEA affiliate.

Compensation and Vested Rights

Caponegro v. State-Operated School Dist. of the City of Newark, __ N.J. Super. __ (App. Div. 2000), addressed the rights of high-level administrators terminated when the State took over Newark's public schools. Under the takeover statute, any contracts for

these administrators were extinguished on the date the State-operated district was created. The employees therefore could not seek compensation for the rest of that school year. They could, however, seek payment of deferred compensation already earned -- e.g. accumulated vacation days and sick leave days. Taking away such compensation would be an unconstitutional deprivation of vested rights. *See In re Morris School Bd.*, 310 N.J. Super. 332 (App. Div. 1998), certif. den. 156 N.J. 407 (1998).

Union Conventions

Judge Arthur D'Italia of the Hudson County Superior Court has ruled that a statute granting FMBA members paid leave to attend the FMBA convention is "special legislation" violating the New Jersey Constitution. *New Jersey State FMBA v. North Hudson Reg. Fire and Rescue*, L-651099 (2/4/00), app. pending. Similar statutes also grant paid leaves to IAFF, PBA and FOP members to attend conventions.

Union Buttons

In *Green Tp. Ed. Ass'n v. Rowe*, 328 N.J. Super. 525 (App. Div. 2000), Judge Baime authored a decision holding that the school

board could constitutionally prohibit teachers from wearing buttons stating "NJEA SETTLE NOW" in the presence of students on school property. But the Court also held that the policy was overbroad because other parts could be read to prohibit employees from using their lunch breaks or free periods to discuss political issues even though no students were present; or to prevent teachers from speaking at Board meetings on school property; or to prohibit teachers from passing out leaflets off school property during non-working hours.

Pensions and Retiree Health Benefits

In *New Jersey Ed. Ass'n v. Bd. of Trustees, Public Employees Retirement System*, 327 N.J. Super. 405 (App. Div. 2000), Judges Muir, Wallace, and Lesemann upheld a PERS regulation requiring a deceased employee's beneficiaries to elect either a retirement allowance or a full insurance benefit. But in *New Jersey Ed. Ass'n v. Bd. of Trustees, Public Employees' Retirement System*, 327 N.J. Super. 326 (App. Div. 2000), the same panel invalidated regulations requiring all retired persons receiving a disability pension to undergo a

medical examination if the PERS Board or the TPAF Board has good cause to believe the retiree is no longer disabled. The regulations contravened statutes limiting such examinations to the first five years after retirement.

Our Supreme Court has estopped a public employer from discontinuing health benefits for a retired police officer and his dependents. *Middletown Tp. PBA Local No. 124 v. Middletown Tp.*, 162 N.J. 361 (2000). The officer did not have the 25 years of actual service required for coverage when he retired, but he justifiably relied on the parties' collective negotiations agreement and the assurances of Township representatives that health coverage would be continued and he received benefits for ten years. The Supreme Court approved the reasoning in *Wood v. Borough of Wildwood Crest*, 319 N.J. Super. 650 (App. Div. 1999) and noted that a subsequent amendment to N.J.S.A. 40A:10-23 now authorizes municipal employers to grant benefits to retiring employees in the plaintiff's position.

The Board of Trustees of the Police and Firemen's Retirement System has adopted new regulations defining "base pay" and "creditable compensation" for pension purposes.

Longevity, holiday, and education benefits paid only at the end of the employee's career cannot be included in base pay. Commission case law has established that interest arbitrators cannot decide what is included in base pay for pension purposes, but has distinguished the negotiability of base pay issues for other purposes.

FLSA and Age Discrimination

Allen v. Fauver, 327 N.J. Super. 14 (App. Div. 1999), holds that State employees may not bring a Fair Labor Standards Act claim against their employer in State courts. Moreover, State employees are not covered by New Jersey's Wage and Hour Law.

The *Alden* case discussed in my annual report was followed in *Kimel v. Florida Bd. of Regents*, __ U.S. __, 81 FEP Cases 970 (2000). The Court held that the federal Age Discrimination in Employment Act could not constitutionally authorize suits by state employees against their employers.

Police Departments

In *Reuter v. Borough of Fort Lee Council*, 328 N.J. Super. 547 (App. Div. 2000), the Court invalidated a Council

resolution creating a deputy chief position. N.J.S.A. 40A:14-118 requires that the organizational structure of a police department and the number of positions be established by ordinance rather than resolution.

In *DiPaolo v. Passaic Cty Freeholders Bd.*, 162 N.J. 572 (2000), aff'g 322 N.J. Super. 487 (App. Div. 1999), an outgoing board of freeholders acted ultra vires when it appointed an adjuster to a five-year term. Since no statute fixed a term of office or authorized the old governing body to enter a five-year contract, the new governing body could remove the employee at its pleasure.

Disciplinary Issues

Yajcaji v. Albert C. Wagner Youth Correctional Facility, App. Div. Dkt. No. A-5509-97T3 (1/18/00), reversed an MSB determination upholding a five-day suspension of a lieutenant corrections officer. The evidence did not suffice to show that the lieutenant knew or should have known that he was required to remain at Center Control during an emergency or that he was required to apprise the on-call administrator when he became aware of the problem.

Prince v. Goslin, App. Div. Dkt. No. A-378-98T3 (2/9/00), upholds a police officer's

termination based on charges that he obstructed the administration of justice by advising a citizen to falsify an accident report. The Township Committee could properly designate itself to hear disciplinary charges arising before that designation, but could not adopt and apply disciplinary rules and regulations retroactively. The Court also ruled that the 45-day time limit under *N.J.S.A. 40A:14-147* for filing disciplinary charges applies only to charges based on violations of department rules or regulations. Since the charges alleged a criminal violation, obstruction of justice, the 45-day period did not apply.

Madera v. Borough of Surf City, App. Div. Dkt. No. A-7471-97T2 (2/16/00), upheld a police officer's six-month suspension for unbecoming conduct and using his position to obtain favorable treatment from a radiologist's office. The Court rejected an argument that the officer should have been dismissed; he had served for nine years with many commendations and only one minor reprimand. The Court distinguished *Comse v. Borough of E. Newark Tp. Comm.*, 304 *N.J. Super.* 191 (App. Div. 1997), certif. den. 156 *N.J.* 381 (1998), holding that dismissal is required

given a breach of discipline so serious that it supports a suspension greater than six months. In this case, the trial judge did not impose a penalty in excess of six months.

Privatization

Hudson v. North Brunswick Tp., App. Div. Dkt. No. A-5977-97T1 (2/8/00), holds that a decision to privatize services and lay off employees was made in good faith and not in retaliation for a union grievance and unfair practice charge seeking overtime compensation. The MSB upheld the layoffs given a legitimate cost-saving motive and no proof that the privatization was pretextual. The union did not file an unfair practice charge contesting the layoffs.

CEPA Issues

The Supreme Court has affirmed *Cedeno v. Montclair State Univ.*, 319 *N.J. Super.* 148 (App. Div. 1999), substantially for the reasons stated in Judge Skillman's opinion. That opinion is described in my annual report. As a rule, a public employee statutorily disqualified by a criminal conviction from obtaining public employment in the first place cannot maintain an action asserting that his or

her discharge violated CEPA or LAD. Unlike *Cedeno*, however, a case may present aggravated circumstances where the need to vindicate LAD or CEPA policies will justify an action seeking compensation for tangible physical or emotional harm suffered during employment.

CEPA does not apply to an employee's disclosures about co-employees' activities unless those activities implicate the public interest. *Roach v. TRW, Inc.*, 326 N.J. Super. 493 (App. Div. 1999). The Court distinguished *Higgins v. Pascack Valley Hosp.*, 158 N.J. 404 (1999), where the co-employees' activities victimized the public as well as the employer.

In *Schechter v. New Jersey Dept. of Law & Public Safety*, 327 N.J. 428 (2000), summary judgment was granted against a plaintiff employee in a CEPA action. No cause of action existed because the decision of the Division of Gaming Enforcement to assign lower priority to cases excluding certain persons from casinos did not violate any law or clear mandate of public policy.

Public Records

Tenure charges against a superintendent are "public records" under the

Right-to-Know law and have to be disclosed to the press upon request. *Williams v. Atlantic City Bd. of Ed.*, ___ N.J. Super. __ (App. Div. 2000). The Court rejected arguments that the charges were not public because the Board considered whether to bring the charges in private session and because Executive Order 11 makes disciplinary information in personnel files non-public.

Indemnification

In *Loigman v. Monmouth Cty. Freeholders Bd.*, ___ N.J. Super. __ (App. Div. 2000), the Court held that N.J.S.A. 59:10-4 authorized the freeholders to indemnify the Monmouth County Prosecutor against an award of punitive damages arising out of the performance of his duties. An award of punitive damages does not necessarily mean that the employee's acts constituted "actual fraud, actual malice, willful misconduct or an intentional wrong" under that statute. The decision to indemnify an employee is a legislative policy determination unreviewable by a court.

STATUTES

N.J.S.A. 18A:16-1.3 requires a school board to notify the State Board of Examiners when a non-tenured, certificated employee is dismissed. Under a new amendment, however, the notice requirement does not apply when an employee's contract is not renewed. Further, if a mid-year dismissal is contested in arbitration or in an administrative or court proceeding, the school board shall not report the dismissal unless an arbitrator, agency, or court finds just cause for dismissal due to misconduct in office. The amendment does not create a right to tenure.

The Governor has signed three bills that may have labor relations implications. *P.L.* 1999, *c.* 438 provides regionalization incentive aid for certain school districts; *P.L.* 1999, *c.* 431 permits local governmental employers to continue health benefits coverage for certain employees; and *P.L.* 1999, *c.* 359 provides for the legal defense of State troopers and officers and authorizes reinstatement and recovery of wages in certain cases.

The Legislature has enhanced PFRS retirement and survivor benefits. *P.L.* 1999, *c.* 428. A member age 55 or older with 20 or more years of service can retire with a benefit

equaling 50% of final compensation in lieu of the regular retirement allowance. Final compensation means the compensation paid the member in the last 12 months of creditable service before retirement. Further, if that member was forced to retire at age 65, he or she can receive an additional 3% of final compensation for every additional year of creditable service between 20 and 25 years.